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Supreme Court, U.S.
FILED

06-210 OCT 20 2005

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October Term, 2005, No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2005

GAVIN LEE HAWKINS,

Petitioner,

vs.

ERIC FRANKLIN, Warden,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner Pro Se

QUESTIONS PRESENTED

The following questions are critical to the resolution of this Petition for a Writ of Certiorari.

1. Whether Petitioner's Trial Counsel was ineffective in violation of the Sixth and Fourteenth Amendment of the United States Constitution when Trial Counsel failed to subpoena a critical defense witness to rebut the alleged victim's allegations and testimony at Petitioner's trial.
2. If the answer to the first question is "yes," the following question is presented: Whether, the ineffectiveness of Petitioner's Trial Counsel rendered Petitioner's trial fundamentally unfair.
3. Whether the United States Court of Appeals for the Tenth Circuit erred in upholding the Oklahoma Court of Appeals rejection of this claim.

PARTIES

Pursuant to Supreme Court Rule No. 14.1(b), all Parties hereto are as stated in the Caption. There are no Corporate Parties.

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IN THE SUPREME COURT OF THE UNITED STATES

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GAVIN LEE HAWKINS,

Petitioner,

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Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, pro se, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is not reported in the Federal Reporter, but is seen in Appendix A hereto. No petition for Rehearing was filed.

The decision by the U.S. District Court for the Western District of Oklahoma, *Hawkins v. The State of Oklahoma,*

Case No. CIV-03-1079-R., rendered on December 9, 2004, unpublished - *(See Appendix B* hereto,) No Motion for New Trial was filed.

The State affirmance of Mr. Hawkins criminal convictions is styled *Gavin Lee Hawkins v. The State of Oklahoma*, Appellate Case No. F-2001-264. *(See Summary Opinion, Appendix C.)* No Petition for Rehearing was filed.

The "Judgment and Sentence" by the District Court of Grady County, is unpublished, and no Motion for New Trial was filed. That "J&S" does not address the issues involved herein. *(See Appendix D.)*

JURISDICTION

The Judgment whose review is sought herein was rendered by the U.S. Court of Appeals for the Tenth Circuit on July 22, 2005. The time (of day) of the filing of that decision is unknown.

No petition for rehearing, or similar pleas for reconsideration, was filed.

This is a Petition, not a cross-petition, for a writ of certiorari.

Jurisdiction is conferred on the Supreme Court to review the decision below by 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY PROVISIONS INVOLVED

The Federal provisions involved include the following:

The Congress shall have the power:

To make all Laws which shall be necessary and proper for carrying into Execution of the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article I, Section 8, Clause 8. And from the U.S.C.A. Const., Amend. § VI

In all criminal prosecutions, the accused shall enjoy the

right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S.C.A. Const., Amend XIV §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws.

The State provisions involved include the following:

Okla. Const., Art. II, § 2 - Inherent Rights

As the Oklahoma Constitution recognizes and guarantees that [A]ll persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry.

Okla. Cons., Art. II, §7 - Due Process of Law

No person shall be deprived of life, liberty, or property, without due process of law.

Okla. Const., Art. II, § 20 - Rights of Accused in Criminal Cases

In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury

of the county in which the crime shall have been committed, or where uncertainty exists as to the county in which the crime was committed, the accused may be tried in any county in which the evidence indicates the crime might have been committed. Provided, that the venue may be changed to some other county of the state, on the application of the accused, in such manner as may be prescribed by law. He shall be informed of the nature and cause of the accusation against him and have a copy thereof, and be confronted with the witnesses against him, and have compulsory process for obtaining witnesses in his behalf. He shall have the right to be heard by himself and counsel; and in capital cases, at least two days before the case is called for trial, he shall be furnished with a list of the witnesses that will be called in chief, to prove the allegations of the indictment or information, together with their post office addresses.

5 Okl. St. Ann. 2001, Chap. 1, App. 3-A - The Oklahoma Rules of Professional Conduct. These rules were prescribed by the Oklahoma Bar Association and the Oklahoma Legislature to ensure that a lawyer's conduct should conform to the requirements of the law. Accordingly, the rules of Professional Conduct are rules and failure to comply with an obligation imposed by one of these rules is a basis for invoking the disciplinary process. Therefore, the rules of professional conduct that apply to this case are as follows:

1. Rule 1.1 Competence requires that "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."
2. Rule 1.3 Diligence requires that "A lawyer shall act

with reasonable diligence and promptness in representing a client."

3. Rule 1.4(a) requires that "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."

22 Okl. St. Ann. § 13 - Right to Speedy Trial, Counsel and Witnesses

In a criminal action the defendant is entitled:

1. to a speedy and public trial.
2. To be allowed counsel, as in civil actions, or to appear and defend in person and with counsel; and
3. to produce witnesses on his behalf, and to be confronted with the witnesses against him in the presence of the court.

22 Okl. St. Ann. §707 - Defendant's Subpoenas

The clerk of the court at which an indictment is to be tried, must, at all times, upon the application of the defendant, and without charge, issue as many blank subpoenas, under the seal of the court and subscribed by him as clerk, for witnesses within the state may be required by the defendant. And, finally, there is:

Petitioner was denied a subpoenas to obtain a witness because trial counsel failed to provide the court clerk with names necessary to compel attendance of witness to testify that alleged victim was lying about Petitioner.

20 O.S. Supp., 1999, § 1304 (B) (3)

(B) The term "expenses" shall include the following items and none other:

3. Witness fees and mileage for witnesses subpoenaed by the defense as setout in Section 81 et seq. Of Title 28 of the Oklahoma Statutes, except that expert witnesses for county indigent defenders shall be paid a reasonable fee for their services.

28 Okl. St. Ann. 1997, § 81 (A)(3)(a-b) - Witness Fee

A. Whenever, under the laws of this state, a person may be compelled by order, subpoena, or other lawful compulsion to appear as a witness, whether or not testimony or other evidence is actually adduced the witness shall receive the following:

3. For a witness who appears from his state pursuant to an order, subpoena, or other lawful means for compelling the appearance of the witness:
   a. if attendance is required at a place less than sixty (60) miles from the residence of the witness, Five Dollars ($5.00) for each day of attendance, plus fifteen cents ($.15) for each mile actual and necessarily traveled in going to and returning from the place of attendance, or
   b. if attendance is required at a place more than sixty (60) miles from the residence of the witness, Twelve Dollars ($12.00) for each day of attendance, plus fifteen cents ($.15) for each mile actual and necessarily traveled in going to and returning from the place of attendance.

STATEMENT OF THE CASE

After a jury trial in the District Court of Grady County, State of Oklahoma, Petitioner convicted of two counts of

Lewd Molestation in violation of 21 Okla. Stat. Ann. 1991, § 1123(A). He was sentenced to twenty (20) years on one count and ten (10) years on the other count to be served consecutively. The Oklahoma Court of Criminal Appeals affirmed the convictions, but modified Count III to ten years, based on prosecutorial misconduct.

1. The Underlying Facts

The alleged victim, Stephanie Owens, was the first witness called by the State. After testifying to some introductory matters, Stephanie stated that her stepfather, Gavin Hawkins, started touching her inappropriately in 1997 (Tr. 250, lines 10-15).

Stephanie claimed that sometime during Fall of 1997, she was asleep in her mother and stepfather's [Petitioner] bed. After her mother left early in the morning for work, Petitioner alledgedly entered the bedroom and removed her clothes and his and then rubbed his penis on her buttocks - (Tr. 250-253).

The accuser later testified that another incident occurred on April 1998, when she stayed home from school on that day, because the day before she had given her dog a bath with flea treatment without wearing any protective clothing. As a result she was overly exposed to the chemicals and felt ill on the evening of April 18, 1998.

She then claimed that Petitioner came into the room in which she was sleeping, and rubbed his private parts on her buttocks and vagina. She also testified that he placed her on some pillows and poured some "watery coconut-smelling" lotion on her back and buttocks - (Tr. 258-59).

The accuser later testified that Petitioner took her from the bed and placed her into the shower. He got into the shower with her and rinsed her off. He then put her clothes back on her and placed her back on the bed. (Tr. 259, lines 9-23).

At Petitioner's jury trial, his trial counsel failed to follow

a specific court order that established a deadline for turning in a witness list. As a result of this failure, Petitioner was not allowed to present the testimony of Bianca Thomas which would have refuted the accuser's [Stephanie Owens] testimony which condemned Petitioner to prison. Miss Thomas' testimony was critical to Petitioner's defense, because it would have established that the accuser was lying about Petitioner allegedly molesting her. Additionally, prior to trial counsel's opening argument, the State objected to the introduction of certain witnesses based on counsel's failure to timely file the witness list.

The above facts are the operative facts underlying the counts for which Petitioner was convicted. Any remaining facts will be presented within the context of the specified text *infra.*

2. The State District Court Proceedings

In 1999, Petitioner was charged in a four count State Information Sheet in the District Court of Grady County, Oklahoma, with four (4) counts of Lewd Molestation in violation of 21 Okla. Stat. Ann. 1991, § 1123(A). The jury found him guilty of two of the four counts and recommended sentences of ten (10) and twenty (20) years. The court sentenced Mr. Hawkins accordingly and ran the counts consecutively to each other.

3. The Oklahoma Court of Criminal Appeals Decision

a. On appeal, Petitioner initially argued in this third proposition that he was entitled to a new trial because the trial court had abused its discretion by excluding the testimony of Bianca

Thomas; and lastly in Proposition Four, Petitioner received ineffective assistance of counsel because trial counsel failed to subpoena Bianca Thomas. Her testimony was critical to Petitioner's defense, because she would have testified that the alleged victim, Stephanie Owens was lying to get rid of the Petitioner.

b. On May 17, 2003, the Oklahoma Court of Criminal Appeals affirmed Petitioner's conviction explaining that in Proposition III: "the Trial Court did not abuse its discretion by excluding the testimony of Bianca Thomas," and in Proposition IV "Trial Counsel performed below an objective standard of reasonableness, but Appellant suffered no prejudice." However, the State Appellate Court modified Petitioner's sentence of twenty (20) years to ten (10) years in Count III, by reason of an improper prosecutorial closing argument which was raised by Petitioner his first proposition on appeal.

4. The Federal District Court's Decision

In 2003, Mr. Hawkins petitioned the United States District Court for the Western District of Oklahoma for a writ of habeas corpus in Case No. CIV-03-1079-R. In the Petition, Petitioner reasserted the issue of ineffective assistance of counsel. The Federal District Judge, the Honorable David L. Russell presiding, transferred the case to the Magistrate Judge, Bana Roberts for preliminary matters which included a Report and Recommendation.

On November 12, 2004, the Magistrate entered a Report and Recommendation denying said petition for writ of habeas corpus, adopting the State Appellate Court's rationale in affirming Petitioner's conviction.

On December 3, 2004, Petitioner filed an objection to the Magistrate's Report and Recommendation arguing that the State Appellate Court issued a Summary Opinion that fore-

goes any meaningful discussion of either the facts or the law on which it bases its decision. Therefore, the State Appellate Court forfeited the right to the usual deference to state court findings and rulings embodied in 28 U.S.C. § 2254(d). Next, Petitioner argued that the Magistrate erred in denying his claim of ineffective assistance of counsel, asserting that "he should be given opportunity to prove any contested factual issue remaining in this case."

On December 9, 2004, the Federal District Judge Russell adopted the Magistrate's Report and Recommendation, wherein, he failed to properly address the issues s presented by the Petitioner. In fact, the Federal District Judge failed to base his decision on any factual finding of fact or conclusion of law. He simply denied out of hand the claims asserted by Mr. Hawkins.

5. The Tenth Circuit Court of Appeals Decision

On March 30, 2005, Petitioner petitioned the United States Court of Appeals for the Tenth Circuit for a Certificate of Appealability, appealing the Federal District Court's denial of his Petition for Writ of Habeas Corpus. Petitioner reasserted his ineffective assistance of counsel claim; however, on July 22, 2005, the Tenth Circuit denied a Certificate of Appealability (COA) on the basis that Petitioner failed to make the necessary showing of the denial of a constitutional right as prescribed by 28 U.S.C. § 2253(c)(2). The Court thereafter adopted the Magistrate's Report and Recommendation of the lower Federal District Court. Again, Petitioner's claims went unheeded, wherein, the Federal Court of Appeals failed to properly address the issues as presented.

Reasons for Granting the Petition

In support of his Petition for a **Writ of Certiorari,** the Petitioner, Gavin Lee Hawkins, pro se submits the following facts, argument and authorities which require the reversal of his conviction and the dismissal or remand of his case to the District Court of Grady County.

A. **This court must address these fundamental claims on their merits.**

The *writ of habeas corpus* is rooted in both our Constitution and our history, and it is one of the most important powers granted to the federal court. Mr. Hawkins invokes this Court's jurisdiction to address the issues presented, and submits that an inquiry into the merits of his case will disclose violations of fundamental federal law for which relief can be granted under 28 U.S.C. § 2254.

B. Oklahoma's Appellate and the Federal Court Procedures Deny Due Process of Law Which Mandates Plenary Review by this Court.

While the requirement of exhaustion of state remedies offers state courts the opportunity to conform their decisions to the supreme law of the land, 28 U.S. C. § 2254 expressly confers jurisdiction on the United States District Court for the Western District of Oklahoma and/or the United States Court of Appeal for the Tenth Circuit to reexamine and set aside state court orders and judgments which:

> d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the Untied States; or
>
> (2) resulted in a decision that was based on an un-

> reasonable determination of the facts in light of the evidence presented in the State court proceedings.

This common sense directive is another expression of Congress's preference for allowing the States to operate insofar as possible without direct federal oversight. Just as in the case of the exhaustion requirement, the State courts are to be allowed to show that they can function responsibly, and that they will fairly and impartially enforce each person's fundamental constitutional rights.

This case plainly demonstrates that the Oklahoma's Courts cannot be relied on by this Court to protect the fundamental due process rights of Mr. Hawkins. On direct appeal, the Court of Criminal Appeals acted arbitrarily by issuing a "Summary Opinion" that doesn't engage in any meaningful discussion of the legal principles and factual analysis that led to Petitioner's sentence of *10 years on Count 1 and 10 years on Count 3* to run consecutively in prison. While purporting to have engaged in a "thorough consideration" of "the entire record," no one can ever know whether the Court of Criminal Appeals actually addressed Mr. Hawkins ineffectiveness claims "on the merits," and if so, whether it misunderstood, or misapplied controlling Supreme Court precedent.

The same systemic deficiency is present on Federal Habeas Review with respect to the "facts" prong of § 2254(d)(2); the Federal District Court, and the Tenth Circuit Court of Appeals doesn't discuss the facts *as it understands them to be,* and they steadfastly refuse to permit an evidentiary hearing on the ineffectiveness issues relating to trial counsel. Such arbitrariness is the antithesis of due process of law. Thus, the Federal and Oklahoma State Courts' factual determinations on such issues are *per se unreasonable,* and are not entitled to deference in this court.

However, as a practical matter, the requests, and the motions for evidentiary hearings gain nothing. When Mr. Hawkins sought an evidentiary hearing on habeas review, it was summarily denied. Nowhere in the Western District Court's Findings and Order does that Court make even the most passing reference to the underlying legal issues that Petitioner asserted should have been raised, and would have affected the outcome in his State jury trial.

The Tenth Circuit Court of Appeals in its own turn doesn't purport to have given even the most cursory examination of the worth of the particular claims. When Mr. Hawkins appealed the Federal District Court's denial to the Tenth Circuit, that Court simply affirmed the denial. This cannot be said to meet the requirements of 28 U.S. C. § 2254, and it can't satisfy the State's Obligations under the due process clause of the 14th Amendment.

Hence, the State may be within its rights to refuse to grant evidentiary hearings in its own courthouses, but by doing so it defaults to an unconstitutional process, and guarantees that such hearings will be required in federal habeas actions.

C. Fundamental Federal Rights were Violated

Mr. Hawkins has identified several fundamental federal constitutional errors that undermine the legitimacy of his conviction and sentence which require the intervention of this Court to provide him with vindication of the 5th, 6th, 8th and 14 Amendment rights.

D. MR. HAWKINS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN COUNSEL FAILED TO SUBPOENA A CRITICAL WITNESS TO REFUTE THE STATE'S CASE.

It has long been recognized by the Supreme Court that

the Sixth-Amendment right to counsel is needed to protect the fundamental right to a fair trial. Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55 (1932); Johnson v. Zerbst, 304 U.s. 458, 58 S. Ct. 1019 (1938); and Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963). This right to counsel is crucial, as access to counsel's experience and ability is necessary to provide Petitioners with the "ample opportunity to meet the case of the prosecution" to which they are entitled. Adams v. United States ex rel. McCann, 317 U.S. 269, 275-276, 63 S. Ct. 236,240 (1942). Because an accused's counsel plays a crucial role to ensure that a trial is fair, the Supreme Court has recognized that the "right to counsel is the right to effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984) rehearing denied, 467 U.S. 1267, 104 S. Ct 3562 (1984), citing McMann v. Richardson, 397 U.S. 759, 777, n. 14, 90 S. Ct. 1441, 1449, n. 14 (1970). Counsel, however, can also deprive a Petitioner of the right to effective assistance, simply by failing to render "adequate legal assistance." Cuyler v. Sullivan, 466 U.S. 335 at 344, 100 S. Ct. 1708 at 1716 (1980).

To show that a counsel's assistance was ineffective to the degree that reversal of a conviction is required, two components must be met. First, it must be shown that counsel's performance was deficient. Second, it must be shown that this deficient performance by counsel prejudiced the defense to the point that the errors were serious enough to have deprived the accused of a fair trial with reliable results. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064: Workman v. State, 824 P.2d 378, 382 (Okl. Cr. 1992, cert. denied 113 S. Ct. 258 (1992); Miller v. State, 29 P.3d 1077 (Okl. Cr. 2001); and Glossip v. State, 29 P.3d 597 (Okla. Cr. 2001).

a. Counsel's performance in representing Petitioner was deficient - CAUSE.

In looking at whether counsel's performance was deficient, the proper standard is the objective standard of "reasonably effective assistance." Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. The basic duties an attorney owes his client are: advocating the accused's case, consulting with the accused on important decisions, and keeping the Petitioner informed of important developments during the legal process. Strickland, 466 U.S. at 688, 104 S. Ct. at 2065. The proper measure of attorney performance remains, simply, reasonableness under prevailing professional norms. Strickland, 466 U.S. at 690, 104 S. Ct. at 2065.

In the instant case, trial counsel for Petitioner did not adequately advocate Petitioner's cause. Specifically, trial counsel proved ineffective, in that:

(i) trial counsel was ineffective for failing to move for testimony to rebut the State's circumstantial case; (ii) trial counsel was ineffective for failing to confer with the Petitioner from the month of May, 1 999, until trial in the month of April, 2001. Failure to perform these duties is grossly ineffective.

(i) Trial Counsel was Ineffective for Failing to Move for Testimony to Rebut the State's Circumstantial Case

It was disputed by the State's Prosecuting Attorney and the Oklahoma Court of Criminal Appeals that Petitioner's Trial Counsel failed to follow a specific District Court Order which established a deadline for turning in a witness list in behalf of the Petitioner. As a result of this failure, Petitioner was not allowed to present the testimony of Bianca Thomas (Tr. I, 240-242).

Describing trial counsel's performance as deficient underestimates the severity of the malfeasance. Filing a witness list on time is a procedural due process requirement under Oklahoma Law and by trial counsel not adhering to the mandates

of this statutory law cost Petitioner his liberty and pursuit of happiness. Thus, counsel's deliberate indifference constituted a violation of a court scheduling order, and costing Petitioner a reliable witness to refute the State's circumstantial case.

Based on the cases cited above, trial counsel's conduct in the immediate case cannot be defended as even remotely competent. Counsel was aware that Miss Thomas would be able to provide a motivation for the alleged victim to lie. Counsel did not act as a competent attorney. A competent attorney would have done everything possible to insure that the list was turned in on time. Therefore, Petitioner was prejudiced by counsel's failure to comply with the court's scheduling order

The State's entire case rested on circumstantial evidence that was supported by hearsay statements made by the alleged victim. The fact that the State was asserting a circumstantial, non-scientific prosecution was not withheld from the defense, and was made known to defense counsel prior to trial. It was incumbent upon trial counsel to find and subpoena Miss Thomas as a defense witness to refute the testimony of the alleged victim's testimony. Moreover, Miss Thomas was on an amended defense witness list, dated January 31, 2001, which explained that she would testify "she heard Stephanie Owens talking to her brother about how to get rid of the defendant. Her testimony would have included Stephanie Owens making false allegations about abuse to the DHS." *(See Appendix E)*

While 20 O.S. Supp., 1999, § 1304 (B) (3) provides guidelines for "in state" witnesses, there is no bar to the issuance of a subpoena by the defense for witnesses, or the compensation from the Court fund for their testimony as prescribed by 28 O.S. § 81(A)(3)(a-b).

It was grossly ineffective and extremely prejudicial of Mr. Hawkins' defense attorney to fail to find or subpoena Miss Thomas as a witness to assist in the defense, especially when the State's case was so slim and rested entirely on a hearsay statement with no other evidence to support the hearsay alle-

gation. In this regard, trial counsel's failure to develop an eye witness defense was clearly ineffective.

(ii) Trial counsel ineffectiveness for failing to confer with the Petitioner.

Petitioner was arrested and detained in the Grady County Jail in 1999. The Grady County District Court determined that Petitioner was not indigent and allowed Mr. Hawkins to retain his own counsel. Trial counsel, *Scott Tack*, failed to confer with the Petitioner, and only found time to visit with him one time just before the trial.

Petitioner did not know that he was going to trial until his Trial Counsel called him on a Friday to inform Petitioner that he was going to trial the following Monday. Thus, Trial counsel made only (1) visit in only twenty three (23) months to Petitioner while waiting to go trial. The entire thrust of Petitioner's case was that he was actually innocent of the offenses charged. However, trial counsel failed to act diligently in preparing a defense, communicate with Mr. Hawkins or prepare for trial. In fact, at the outset of the trial beginnings, trial counsel requested a continuance through an *Oral* motion, informing the Court that he was not ready to go trial. However, trial court refused said motion and started proceedings.

The Oklahoma Rules of Professional conduct, 5 O.S., 2001, Chap. 1, App. 3-A clarifies and defines what the professional norm is for attorneys in the State of Oklahoma. Rule 1.1 Competence requires that "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The discussion at Rule 1.1 proves instructive as regards to Petitioner's error:

> Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards

> of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

In Mr. Hawkins case, his life and freedom was, literally, on the line. Surely, trial counsel could have represented this matter more effectively than going into court totally unprepared to meet the case of the prosecution, as appears to be the case through trial counsel's [Scott Tack] own confession:

> **SCOTT TACK:** The Ledford case, yes, took - for some reason took precedence over this case. But I mean I tried that case. I couldn't help it. I couldn't try both of those cases at one time. The second time it was continued was because I had personal problem, as the Court is aware.

(Tr. I, 241, lines 1 through 5; *See* Appendix *F)*

Rule 1.3 Diligence requires that "A lawyer shall act with reasonable diligence and promptness in representing a client." The discussion in Rule 1.3 proves illuminating as regards the issue now asserted:

> Perhaps no professional shortcoming is more widely resented than procrastination. A client's interest can often be adversely affected by the passage of time or the changes of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed.

Oklahoma has decided a host of case regarding such error in regards to this issue. In State ex rel. Oklahoma Bar Association v Dunlap, 995 P.2d 1148, rehearing denied, (Okla. 2000), a case regarding representation in a Post-Conviction proceeding, the Oklahoma Supreme Court noted: "..facts established... That attorney failed to provide competent representation, to keep client reasonably informed, and to make reasonable efforts to expedite litigation consistent with his client's interest, all in violation of rules of professional conduct..." Id., concluding "Attorney's failure to meet with client or file any sufficient papers in connection with client's petition for post-conviction relief ... warranted 30 day suspension from practice and .... costs". Id. compare with State ex rel. Oklahoma Bar Association v Dersham, 990 P.2d 864 (Okla. 1991) "Attorney violated disciplinary rules ... [in] speaking to client only once in nine months ..." and State ex rel. Oklahoma Bar Association v. Evans, 880 P.2d 333 (Okla. 1994), "Professional competence, i.e., acting promptly in pending matters and communicating with client is mandatory obligation imposed upon licensed practitioner; albeit onerous, this obligation is very minimum to expected from lawyer, it epitomizes professionalism, and anything less is breach of lawyer's duty to serve client."

Rule 1.4 (a) requires that "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." It is undisputed, therefore, that "professional competence, acting promptly on a matter, and communication with a client, are mandatory obligations imposed upon attorneys, and is minimum obligation expected from lawyer; anything less is breach of lawyer's duty to serve his client." State ex rel. Oklahoma Bar Association v Johnston, 863 P.2d 1136 (Okla. 1993) accord State ex rel. Oklahoma Bar Association v Evans, 880 P.2d 333 (Okla. 1994) and State ex rel. Oklahoma Bar Association v Dunlap, 995 P.2d 1148, rehearing denied, (Okla. 2000).

Based on the fact that Mr. Hawkin's trial counsel failed to meet with him, failed to pursue a main defense witness to refute the alleged victim's hearsay allegation, and only met with Petitioner only once the weekend prior to trial, indicates by clear and convincing evidence that Mr. Hawkins was denied effective assistance of counsel in this regard. As to this issue, the failure of trial counsel to meet with your Petitioner only one time during the 23 months prior to trial, there can be no conclusion other than that trial counsel Mr. Tack was ineffective.

Therefore, Petitioner proposes to this Court, that the affidavit of Bianca Thomas submitted with this Petition, demonstrates that trial counsel's failure deprived Petitioner of testimony demonstrating a motive for the alleged victim to lie. *See Appendix G).* Therefore, due to trial counsel's ineffectiveness, it cannot be reasonably argued that the result of Petitioner's trial was reliable. Thus, through counsel's action, there was no way that Petitioner could create 'reasonable doubt' to the jury as to committing the offense charged.

b. Trial counsel's lack of effective assistance denied the Petitioner the ability to have a fair trial with reliable results - PREJUDICE.

Rather than improve the quality of legal representation, the purpose of the Sixth-Amendment guarantee to effective assistance is "to ensure that criminal Petitioners receive a fair trial." Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. To determine whether this "fair trial" was denied due to ineffective assistance of counsel, the Court must consider the totality of the circumstances. In looking at all of the circumstances surrounding counsel's performance, the Court must make every effort "to eliminate the distorting effects of hindsight, to re-

construct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 688, 104 s.Ct. at 2065. A presumption exists that counsel's conduct is reasonable, and that it constituted acceptable trial strategy.

Therefore, in deciding an actual ineffective assistance claim, the Court must judge the reasonableness of counsel's conduct based on the facts of the individual case, as of the time the conduct occurred. To show ineffectiveness, a Petitioner must identify the specific actions or omissions of counsel that he is alleging to be unreasonable conduct on the part of counsel. Strickland 466 U.S. at 689, 1104 S.Ct. at 2065.

In Petitioner's case, the specific error of trial counsel is evident. Mr. Hawkins was prejudiced by trial counsel's failure to comply with the State District Court's scheduling order. Therefore, prejudice can be presumed in this case. Failure to perform such an ordinary task such as filing a witness list constitutes constructive denial of right to counsel. Failure to file a witness list is similar to failure to file a Notice of Intent to Appeal. Court have ruled that a failure to file a Notice of Intent to appeal constitutes constructive denial of counsel. Accordingly, due to trial counsel's failure to file the witness list in a timely manner, Mr. Hawkins was deprived of a critical witness.

In like manner, trial counsel should have : (i) moved for testimony to rebut the State's circumstantial case; (ii) conferred with the Petitioner and to visit him more than one time from May 1999 until trial April 2001; Failure to perform these duties was grossly ineffective and extremely prejudicial. This error stemming from trial counsel's specific actions must now be viewed as so prejudicial as to have resulted in Mr. Hawkins being subjected to his adversarial proceedings unarmed and unable to defend himself.

In Miller v State, 29 P.3d 1077 (Okl.Cr. 2001), the Oklahoma Court of Criminal Appeals discussed an ineffective-as-

sistance-of-counsel claim brought by Miller against his trial counsel. In Miller, the Court agreed that trial counsel's "... failure to properly investigate and present evidence, failure to locate and interview witnesses and failure to prepare for trial..." Id at ¶ 56, caused the Court to conclude that "...we cannot in all good conscience say Appellant received a fair trial, a proceeding with a result that can be considered reliable. Strickland, 466 U.S. at 687,104 S.Ct. at 2064." Id at ¶ 59.

In Glossip v State of Oklahoma, 29 P.3d 597 (Okl.Cr. 2001), the Oklahoma Court of Criminal Appeals addressed failure on the part of trial counsel. There, the Honorable Justice Johnson, vice-presiding Judge, noted that "...[trial counsel failed to adequately prepare for trial and the trial mistakes ... were not part of any trial strategy. His failure to utilize available impeachment evidence against Justin Sneed, upon whose testimony the State's entire case relied, was deficient performance and was clearly prejudicial ..." Id. at ¶ 19. The Court also noted "[T]rial counsel's lack of preparation is also apparent from his repeated statements prior to and during trial" Id. at ¶ 24. In Glossip, the Court reversed Mr. Glossip's sentence and remanded for new trial because "[T]he record as a whole suggests that trial counsel was not prepared for trial..." and"...[U]nder the facts of this case ... we cannot say his trial produced a reliable result ..."Id. at ¶ 25.

Mr. Hawkin's case is very similar to Glossip's in that Mr. Hawkins had an attorney who could not engage in meaningful cross examination of the State's witnesses, had failed to properly investigate and impeach the State's primary witnesses,and who, obviously, had not prepared for the adversarial proceeding. However, the Oklahoma Court of Criminal Appeals in denying Petitioner's ineffectiveness claim, held: "trial counsel performed below an objective standard of reasonableness, but Appellant suffered no prejudice." *See Appendix C, page 2 of the Summary Opinion).* The appellate court's determination of this claim cannot be said to meet the standards of effective

representation in affirming Petitioner's conviction.

In order to prove actual ineffectiveness of counsel, a "Petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. at 2066. Petitioner has shown with his argument and supporting case law that trial counsel, Mr. Tack's, action, were such as to "undermine the confidence of the outcome" of the trial in which Mr. Hawkins was unjustly convicted and sentenced to a term of twenty (20) years incarceration.

The U.S. Supreme Court has held that "[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case, the court should be concerned with whether, despite the strong presumption of reliability, the result of the proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." Strickland,466 U.S. at 696, 104 S.Ct. at 2069.

Representation of a criminal Petitioner entails certain basic duties. Strickland, 466 U.S. at 690, 104 S.Ct. at 2065. While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators. Cronic, 104 S.Ct. at 2046, citing U.S. ex rel. Williams v. Twomey, 510 F.2d 634 at 640 (CA 7), cert. denied, sub nom. Sielaff v. Williams, 423 U.S. 876, 96 S.Ct. 148 (1975).

This cause must be remanded by this Honorable Court for further review and this issue made a specific focus of inquiry during the Evidentiary Having required to meet the burden of the errors as argued. Such judicial review will determine beyond doubt that Mr. Hawkins was deprived of effective assistance of counsel in this cause, thereby rendering any Judgment entered as a result to be unreliable, unconstitutionally

obtained, and void under the law.

E. Conflicts with Other Circuits

The most salient and conspicuous conflict of Tenth Circuit Court's decision is with the examples that is set in precedents from the First, Seventh, Ninth and Eleventh 'circuit Court of Appeals. The examples include counsel's failure to purse an insanity defense in Genius v. Pepe, 50 F.3d 60 (1st Cir. 1995); failure to call witnesses in support of credible defense in Harris v. Reed, 894 F.2d 871 (7th Cir. 1990); failure to interview other suspect in Sanders v. Ratelle, 21 F.3d 1446 (9th Cir. 1994); and, failure to file suppression motions in Huynh v King, 95 F.3d 1052 (11th Cir. 1996). There is no way that the Tenth Circuit and the above referenced Circuits decisions can be rationalized with one another.

In Harris, *supra,* following a murder conviction, Petitioner, [Warren Lee Harris] filed a petition for writ of habeas corpus into the United States District Court for the Northern District of Illinois. The court denied the petitioner and appeal was taken. The Court of Appeals affirmed. On grant of certiorari, the Supreme Court, ,Justice Blackmum, in Harris v. Reed, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d reversed and remanded. On remand the Court of Appeals, Bauer, Chief Judge, held: (1) defendant's attorney's failure to call eyewitnesses who saw another man run from scene of shooting constituted ineffective assistance of counsel, and (2) defendant was prejudiced by counsel's ineffectiveness.

Other Circuits have generally recognized and upheld the Federal presumption that counsel is ineffective when counsel fails to call witnesses who can and will refute the Government's evidence. Therefore, based on the other circuits holding thereof, the Tenth Circuit Court of Appeals was fundamentally incorrect in denying Mr. Hawkins Certificate of Appealability. Their decision to adopt the State Appellate's refusal of Peti-

tioner's claim concerning trial counsel ineffectiveness, was nothing more than good old fashion, *Rubber Stamp Refusal.*

APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

GAVIN LEE HAWKINS, Petitioner-Appellant, vs. STATE OF OKLAHOMA, Respondent-Appellee	No. 04-6398 (W.D. Oklahoma) (D.C. No. CV-03-1079-R)

ORDER

BEFORE **EBEL, MCKAY,**AND **HENRY,** Circuit Judges

Gavin Lee Hawkins, a state prisoner proceeding pro se, seeks a certificate of appealability (COA) to appeal the denial of his 28 U.S.C. § 2254 petition for habeas corpus based on ineffective assistance of trial counsel. We deny his request for a COA and dismiss this matter.

I. BACKGROUND

In 1999, Mr. Hawkins was convicted by a state-court jury in Grady County, Oklahoma, of two counts of lewd molestation of a child. On direct appeal to the Oklahoma Court of Criminal Appeals (OCCA), Mr. Hawkins claimed that he received ineffective assistance of counsel. His claim was based on the fact that his lawyer failed to timely include the proper

name of a defense witness on the witness list and the court subsequently refused to allow the witness to testify. According to Mr. Hawkins, the witness would have testified that the alleged victim of the lewd molestation charges, who was Mr. Hawkins's stepdaughter, "had plotted with her two brother to 'get rid of Mr. Hawkins,' and that [the alleged victim] said that 'she would do anything to get rid of [Mr. Hawkins]." Relevant State Court Records, doc. 13, at 11. Mr. Hawkins argued that the testimony of this witness would have established the child's motive and intention to lie. *id.* Mr. Hawkins contends that he was prejudiced because of counsel's faulty performance deprived him of a "critical witness." *id.* at 15.

The OCCA considered Mr. Hawkins's ineffective assistance claim and denied relief in a summary opinion. Although the OCCA held that Mr. Hawkins's trial counsel did indeed perform below the objective standard of reasonableness required by *Strickland v. Washington,* 466 U.S. 668 (1984), it concluded Mr. Hawkins suffered no prejudice as a result. *See* OCCA Op. at 2.

Mr. Hawkins subsequently requested a COA and filed a 28 U.S.C. § 2254 motion for habeas corpus relief. A magistrate judge recommended denial of the petition. Citing *Aycox v. Lytle*, 196 F.3d 1174, 1177 (10th Cir. 1999), the magistrate judge concluded that Mr. Hawkins's ineffective assistance claim was adjudicated on the merits by the OCCA. The magistrate judge therefore concluded that the OCCA's determination was entitled to deference under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Under AEDPA,

> [i] if a claim is adjudicated on the merits in state court, we will grant habeas relief to a petitioner only if he can establish that the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evi-

dence presented in the State court proceedings."

Spears v. Mullin, 343 F. 3d 1215, 1255 (10th cir. 2003) (quoting 28 U.S.C. § 2254(d)(1), (2)). Noting that AEDPA requires federal courts to presume state court factual findings are correct and places the burden on the petitioner to rebut this presumption by clear and convincing evidence, *see id.,* the magistrate judge determined that Mr. Hawkins had not met AEDPA's demanding standards under § 2254. *See Upchurch v. Bruce,* 333 F.3d 1158, 1162 (10th Cir. 2000) (quoting *Williams v. Taylor,* 529 U.S. 362, 413 (2000)).

The magistrate judge ruled that the OCCA's determination that Mr. Hawkins was not prejudiced by his counsel's failure to timely include the witness's name on the witness list was not an unreasonable application of *Strickland.* The familiar two-part test of *Strickland* requires a petitioner to show not only that counsel's performance was objectively unreasonable, but also that it prejudiced him or her. *See Strickland,* 466 U.S. at 689-90. to meet the prejudice prong, Mr. Hawkins must establish a reasonable probability that the witness's testimony would have resulted in a different outcome at trials. *See id.* at 694.

The magistrate judge determined that Mr. Hawkins could not do so because (1) Mr. hawkins made incriminating admissions to Department of Human Services and law enforcement officials concerning the lewd molestation acts against the child, (2) Mr. Hawkins wrote a letter to the child, apologizing for what he had done and for claiming that she was lying, and (3) Mr. Hawkins's counsel had an opportunity to explore the relationship between Mr. Hawkins and the child.

The magistrate judge also addressed Mr. Hawkins's request for an evidentiary hearing to present the factual basis for his ineffective assistance claim. Having determined that mr. Hawkins was diligent in attempting to develop the factual basis for his claim by moving to supplement the record and

requesting an evidentiary hearing in state court, the magistrate judge concluded he was not entitled to an evidentiary hearing in federal court because his allegations were contravened by the factual record in the case. *See* Rec. doc 16, at 14-15 (Rep't and Rec. filed Nov. 12, 2004).

After considering and rejecting Mr. Hawkins's objections to the magistrate judge's report and recommendation, the district court adopted it in its entirety and agreed that Mr. Hawkins was not entitled to an evidentiary hearing because his claim of prejudice was contravened by the existing factual record. The district court also denied that habeas petition with regard to the ineffective assistance claim.

Mr. Hawkins then filed a notice of appeal. Because the district court did not address the issue of a COA, a COA is deemed denied under our Emergency General Order of October 1, 1996. We construe Mr. Hawkins's notice of appeal as a request for a COA. We must determine whether to grant a COA before turning to the merits. We exercise jurisdiction under 28 U.S.C. § 2253 and deny a COA.

II. DISCUSSION

Issuance of a COA is jurisdictional. Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). A COA can issue only "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El, 537 U.S. at 327. " The COA determination under § 2253 (c) requires an overview of the claims in the habeas petition and a general assessment of their merits." Id. at 336. "This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the stature forbids it." Id. While Mr. Hawkins is not required

to prove the merits of his case in applying for a COA, he must nevertheless demonstrate " something more than the absence of frivolity or the existence of mere good faith on his or her part." *Id.* at 338 (internal quotation marks omitted).

For substantially the same reasons set forth in the magistrate judge's report and recommendation as adopted by the district court in its December 2004 Order, we conclude that Mr. Hawkins has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2).

III. CONCLUSION

We have reviewed Mr. Hawkins's brief, the magistrate judge's thorough and well-reasoned report and recommendation, the district court's order, and the record on appeal. Because Mr. Hawkins has failed to make the necessary showing, we deny a COA and dismiss the appeal.

Entered for the Court,

Robert H. Henry
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

GAVIN LEE HAWKINS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**CIV-03-1079-R**
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER

Before the Court are the Report and Recommendation of United States Magistrate Judge Bana Roberts entered November 12, 2004 and Petitioner's Objections to the Report and Recommendation filed December 3, 2004. Pursuant to 28 U.S.C. § 636(b)(1)(B), the Court reviews *de novo* those aspects of the Report and recommendation to which Petitioner objects.

First, Petitioner asserts that when, as in Petitioner's direct appeal, the Oklahoma Court of Criminal Appeals ("OCCA") issues a summary opinion in which it foregoes "any meaningful discussion of either the facts or the law on which it bases its decision [],, "it should necessarily forfeit the right to the usual deference to state court findings and rulings embodied in 28 U.S. C. § 2254(d)." Petitioner's Objection at p. 2. The Magistrate Judge already disposed of this objection, stating: "The fact that the OCCA denied relief to Petitioner in a sum-

mary opinion does not affect the deference owed to the state court's results." Report and Recommendation at p. 3, citing *Aycox v. Little,* 196 F.3d 1174, 1177 (10th Cir. 1999).

Next, Petitioner seems to argue that the Magistrate Judge erred in denying his request for an evidentiary hearing on his claim for ineffective assistance of counsel, asserting that he "should be given an opportunity by this Court to prove any contested factual issue remaining in this case." Petitioner's Objections at p. 4. The Magistrate Judge correctly concluded that Petitioner was diligent in attempting to develop the factual basis for his ineffective assistance claim by moving to supplement the record and requesting an evidentiary hearing in state court, see Report and Recommendation at p. 14, and thus that the standard set forth in 28 U.S.C. § 2254(e)(2) is not controlling. *See, e.g., Cannon v. Mullin,* 383 F.3d 1152, 1175 (10th Cir. 2004); *Miller v. Champion,* 161 F.3d 1249, 1253 (10th Cir. 1998). The Magistrate Judge therefore correctly concluded that the pre-AEDPA standard applied in determining whether Petitioner was entitled to an evidentiary hearing and under that standard, Petitioner was not entitled to an evidentiary hearing because Petitioner's claim that he was prejudiced by his counsel's deficient performance was contravened by the existing factual record. *See* Report and Recommendation at pp. 14-15. *Compare with Cannon,* 383 F.3d at 1175 (habeas petitioner is entitled to evidentiary hearing in federal court under pre-AEDPA standard if the facts were not adequately developed in state court for a reason not attributable to the petitioner and the petitioner's allegations, if true and not contravened by the existing factual record, would entitle him to relief).

Petitioner's other objections are incomprehensible and/or irrelevant.

In accordance with the foregoing, Petitioner's Objections to the Report and Recommendation f the Magistrate Judge are without merit. The Report and Recommendation of the Magistrate Judge is ADOPTED in its entirety and the petition of

Gavin Lee Hawkins for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DENIED.

IT IS SO ORDERED THIS 9th day of December, 2004.

DAVID L. RUSSELL
UNITED STATES
DISTRICT JUDGE

APPENDIX C
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

GAVIN LEE HAWKINS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**CIV-03-1079-R**
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.[1]	)	

REPORT AND RECOMMENDATION

Petitioner, a state prisoner appearing *pro se,* brings this action pursuant to 28 U.S.C. § 2254, seeking a writ of habeas corpus. The matter has been referred to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B). Respondent has filed a response and Petitioner has replied. Thus, the matter is at issue. For the reasons set forth herein, it is recommended that the petition be denied.

Petitioner is challenging his convictions on two counts of lewd molestation following a jury trial in Case No. CF-1999-186 in the District Court of Grady County.[2] The trial court

[1] Respondent has requested the substitution of Lenora Jordan, the warden of James Crabtree Correctional Center, where Petitioner is incarcerated, as the sole respondent. As discussed below, it is recommended that habeas relief be denied, eliminating the need to consider substitution of parties.

[2]Petitioner was convicted of molesting his stepdaughter, S.O., in 1997 (Count 1) and in 1999 (Count 3). The jury returned not guilty verdicts on charges in Count 2 (lewd molestation of S.O. in 1998) and Count 4 (lewd molesting of L.R., a friend of Petitioner's stepdaughter, during the school year of 1997-98). Trial Transcript, Volumes I at 214 and III at 609.

sentenced Petitioner to ten years imprisonment and twenty years imprisonment, respectively, to be served consecutively. Petitioner raised four grounds for relief on direct appeal.[3] *See* Relevant State Court Records [Doc. No. 13], Ex. 1. In an unpublished summary opinion dated May 17, 2003, the Oklahoma Court of Criminal Appeals (OCCA) affirmed Petitioner's convictions and his sentence in Count 1. *Id.*, Ex. 3. However, the Court modified the sentence on Count 3 to ten years imprisonment based on an improper prosecutorial closing argument. *Id.*

Petitioner raises a single ground for relief based on a claim of ineffective assistance of trial counsel. Petition at 9. Respondent admits that Petitioner has exhausted his state court remedies and that the petition is timely. Respondent contends that the OCCA's decision that Petitioner was not prejudiced by the deficient performance of trial counsel is not contrary to or an unreasonable application of Supreme Court law.

Discussion

I. Standard of Review

The sole habeas claim raised by Petitioner was presented to the OCCA on direct appeal and was adjudicated on the merits in a summary opinion that contained a brief discussion of each claim raised. Therefore, Petitioner is entitled to habeas corpus relief only if the OCCA's decision was (1) contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "was based on an unreasonable determi-

[3] In his direct appeal brief, Petitioner raised the following issues: (1) prosecutorial misconduct; (2) the trial court's failure to consider all sentencing options; (3) trial court's error in prohibiting Petitioner from calling witness Bianca Thomas; and (4) counsel provided ineffective assistance by failing to follow the trial court's discovery order and deadline for providing a complete witness list.

nation of the facts in light of the evidence presented in the State court proceedings." *Spers v. Mullin,* 343 F.3d 1215,1225 (10th Cir. 2003) (quoting 28 U.S.C.§ 2254(d)(1) and (2) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), *cert. denied,* 124 S. Ct. 1615 (2004). "Under the 'contrary to' clause, federal habeas courts may issue the writ only 'if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Court] has on a set of materially indistinguishable facts." *Upchurch v. Bruce,* 333 F.3d1158,1162 (10th Cir.) (quoting *Williams v. Taylor,*529 U.S. 362, 413 (2000)), *cert. denied,* 124 S. Ct. 839 (2003). "Under the 'unreasonable application' clause, a federal court may grant habeas relief only 'if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.'" *Id.* at 1162-63. The fact that the OCCA denied relief to Petitioner in a summary opinion does not affect the deference owed to the state court's results. *See Aycox v. Little,* 196 F. 3d 1174, 1177 (10th Cir. 1999). Further, the state court's factual findings are presumed correct and the burden is placed on Petitioner to rebut this presumption by clear and convincing evidence. 28 U.S.C. § 2254 (e)(1); *Sallahdin v. Gibson,* 275 F.3d 1211, 1222 (10th Cir. 2002).

II. Ineffective Assistance of Counsel

Petitioner alleges that he was denied his Sixth Amendment right to effective assistance of counsel. Specifically, he alleges that trial counsel's performance was unreasonably deficient because he failed to provide a witness list which included the correct name of Bianca Thomas within the discovery deadline and that Petitioner was prejudiced by the omission of Ms.

Thomas' testimony.[4] Petition at 9.

Petitioner's claim is based on an issue which arose during defense counsel's opening statement. When Petitioner's counsel referenced the anticipated testimony of "Binky Thomas," the prosecutor objected and informed the trial court during a bench conference that the State had not been provided a list containing the name of this witness ten days before trial as required and had only been told the day of trial that the witness' actual name was "Bianca Thomas." Defense counsel admitted that two continuances had been granted pursuant to his request and that an amended witness list naming "Binky" Thomas was provided only six days before trial. He provided no real reason for the late notice. The trial court ruled that witness Bianca

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[4]Petitioner contends that his single claim of ineffective assistance of counsel encompasses both the third and fourth issues he raised on direct appeal-the trial court's erroneous decision to prohibit the testimony of Bianca Thomas as a sanction for the discovery violation and trial counsel's inadequate performance in failing to comply with discovery timely which prejudiced Petitioner because a "crucial" defence witness could not testify. Petition at 3. In addition, Petitioner alludes to a denial of his Sixth Amendment right to compulsory process as a result of counsel's error; however, Petitioner did not raise such a claim on direct appeal. *See* Relevant State Court Records, Ex. 1 at 10-16. Thus, such claim is unexhausted for purposes of habeas review and if the petition were construed to include a claim of denial of his right to compulsory process, the petition would be subject to dismissal as a mixed petition. *See* 28 U.S.C. § 2254(b)(1)(A); *Rose v. Lundy*, 455 U.S. 509, 510 (1982). The undersigned has determined that the brief reference to a compulsory process issue does not suffice to raise a separate claim on that basis and thus, it is unnecessary to consider dismissal.

Thomas would not be allowed to testify. Trial Transcript (Tr.) at 236-242; 265.

Although not raised as a basis for habeas relief. Petitioner argued on direct appeal that the trial court erred by prohibiting the testimony of Bianca Thomas. Relevant State Courts Records, Ex. 1 at 10-12. Petitioner raises here only the ineffective assistance of his counsel based on counsel's failure to include Ms. Thomas on a timely filed witness list, which prejudiced him by depriving him of a "critical witness." *Id.* at 15. Simultaneous with the filing of Petitioner's direct appeal brief, appellate counsel filed a Motion to Supplement the Record and Application for Evidentiary Hearing. *See* Relevant State Court Records, Ex. 1 at 11. Attached to that motion was an affidavit prepared by Bianca Thomas.[5] *Id.* Neither the motion nor Ms. Thomas' affidavit are included in the state court records although Petitioner has submitted an affidavit by Ms. Thomas which is apparently the one submitted to the OCCA.

In its summary opinion, the OCCA held that "trial counsel performed below an objective standard of reasonableness, but [Petitioner] suffered no prejudice." *Id* (citing *Strickland v. Washington,* 466 U.S. 668 [] (1984)). In that summary opinion the OCCA also denied Petitioner's Motion to Supplement the Record and Application for Evidentiary Hearing. *Id.*

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[5] The State argued that Petitioner's request to supplement the record with the affidavit should be denied because (1) Petitioner failed to follow the Court's procedural rule requiring that such motion be made prior to the filing of his direct appeal brief and (2) Petitioner failed to file a motion for new trial on the issue within 30 days of judgment, as required by Okla. Stat. 22 § 953. Relevant State Court Records, Ex. 2 at 20. *See also* Rules of the Oklahoma Court of Criminal Appeals, Rule 3.11(B)(4) ("A request to supplement under this rule will not be granted after the filing of the requesting party's brief-in-chief.").

As recognized by the OCCA, a petitioner claiming ineffective assistance of counsel must meet a two-part test established by the Supreme Court. First, the petitioner must overcome the strong presumption that his attorney's conduct fell within the "wide range of reasonable professional assistance." *Strickland v. Washington,* 466 U.S. 688, 689-90 (1984). Second, the petitioner must show prejudice to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The absence of either element is fatal to the claim. *See id.* "Courts may address the performance and prejudice components in any order and need not address both if a [petitioner] fails to make a sufficient showing of one." *Hale v. Gibson,* 227 F. 3d 1298, 1314 (10th Cir. 2000). In assessing prejudice, the Court looks at the totality of the evidence, not just the evidence helpful o the petitioner. *See Boyd v. Ward,* 179 F.3d 904,914 (10th Cir. 1999). In the end, "[the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland,* 466 U.S. at 686. Because the OCCA identified the correct legal principle from the Supreme Court's decisions, the state court's decision is reviewed to determine whether the rejection of Petitioner's ineffective assistance of counsel claim involved an "unreasonable application" of federal law. *See Paine v. Massie,* 339 F. 3d 1194, 1998 (10th cir. 2003).

As discussed below, the OCCA's determination that Petitioner was not prejudiced by the trial court's refusal to permit Bianca Thomas' testimony was not an unreasonable application of *Strickland.*

In support of his ineffective assistance claim, Petitioner proffers to this Court a copy of an affidavit executed by Bianca Thomas on November 1, 2001, Petition, Ex. B, which was apparently submitted with Petitioner's Motion to Supplement the Record and Application for a Evidentiary Hearing on his

ineffective assistance of counsel claim on direct appeal. *See* Relevant State Court Records, Ex. 1 at 15. On direct appeal Petitioner asserted that Ms. Thomas would have testified that "[S.O.] the alleged victim, had plotted with her two brothers to 'get rid of Mr. Hawkins,' and that [S.O.] said that 'she would do anything to get rid of [Petitioner].'" *Id.* at 11. Petitioner argued that such testimony would have raised questions about the victim's credibility, demonstrated a motive for the victim to lie, and suggested the possibility of another suspect. *Id.* at 15.[6]

Here, Petitioner argues that the denial of the testimony of Bianca Thomas amounted to a "destruction of evidence" and asserts that if Ms. Thomas had been able to testify, "there would have been a different result in the verdict." Petitioner's Answer to State Response to Petition for Habeas Corpus (Petitioner's Reply) at 2. He further argues that counsel's failure to move for a continuance when the issue arose on the day of trial prejudiced his defense. *Id.* at 3.

Contrary to Petitioner's assertions, he fails to show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. S.O. testified that Petitioner, her stepfather, began touching her inappropriately in 1997. With respect to the charge of lewd molestation in Count 1, she testified that on a date between August and December

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[6]It is unclear whether the OCCA considered Ms. Thomas' affidavit. The affidavit was not part of the trial court record but was submitted as part of Petitioner's motion to supplement the record which motion was denied by OCCA. In the brief on appeal filed simultaneously with the motion to supplement, Petitioner's counsel argued prejudice based on the affidavit of Ms. Thomas. The OCCA found that although trial counsel performed below an objective standard of reasonableness, Petitioner suffered no prejudice.

1997,[7] when she was in the fifth grade, she was asleep in her parents' bed after her mother left for work, and Petitioner entered the bedroom, removed her clothes and his clothes and then rubbed his penis against her buttocks. Trial Volume (Tr. Vol.) II at 250-53. S.O. testified that she later told her mother about what had happened. After discussing the matter with Petitioner, who claimed that it had been an accident, S.O.'s mother put a lock on her bedroom door and gave her an alarm clock so she could wake herself up. Tr. Vol. II at 253; Tr. Vol. III at 319.

With respect to the lewd molestation charge in Count 3, S.O. testified that on April 19, 1999, near the end of her sixth grade year, she stayed home from school because she was not feeling well and she was sleeping in her mother's bed after her mother left for work.[8] Tr. Vol. II at 257-59;261. S.O. further testified that later in the morning, Petitioner came into the bedroom, removed her clothes, and began rubbing his private parts on her buttocks and vagina, and he rubbed her breasts. Tr. Vol. II at 259. She testified that she was pretending to be asleep. Tr. Vol. II at 292. She testified that Petitioner next placed her on some pillows, poured some "watery coconut smelling" lotion on her and rubbed the lotion on her back and buttocks. Tr. Vol. II at 259. S.O. stated that Petitioner than went into the bathroom and turned the shower. *Id.* S.O. testified that Petitioner

[7]Katherine Hawkins, Petitioner's wife and S.O.'s mother, testified that the event occurred in September 1997 because that is when S.O. informed her of Petitioner's first inappropriate touching. Tr. Vol. II at 312.

[8]Mrs. Hawkins testified that she typically left for work at approximately 4:30 a.m., and Petitioner would awaken S.O. and her brother so they could get themselves ready for school. Tr. Vol. II a 372.

[9]S.O. testified that she kept her head down and her eyes closed because she didn't want to see anything and so that Petitioner would think she was still asleep. Tr Vol. II at 260.

placed her in the shower and got into the shower with her.[9]. *Id.* She stated that Petitioner rinsed her off, and after the shower, Petitioner dried her off, put her clothes back on her and placed her in the bed again. *Id.*

Mrs. Hawkins testified that when S.O. first told her in September 1997 that Petitioner had touched her, S.O. gave few details, and that when she subsequently questioned Petitioner, he denied touching S.O. T.R. Vol. II at 313-14. Mrs. Hawkins testified that when she asked S.O. for more details the next day, S.O. said that her father had touched her breasts and began to "hump" on her; when Mrs. Hawkins again confronted Petitioner, he did not deny touching S.O. but claimed that it was a mistake and that he thought S.O. was Mrs. Hawkins. Tr. Vol. II at 314-17. Mrs. Hawkins testified that after a discussion among the three of them, it was agreed that S.O. would have a lock on her door and an alarm clock and that S.O. would not sleep in her parents' bed with them. Tr. Vol. II at 319. Mrs. Hawkins testified that on May 4, 1999, she received a telephone call from the school counselor,[10] and she immediately talked with S.O., who was upset and crying, but gave some details regarding Petitioner's inappropriate touching, including the rubbing of a watery substance on her. Tr. Vol. II at 320-21. Mrs. Hawkins testified that S.O.'s descriptions of Petitioner's conduct were similar to actions in her sexual relationship with Petitioner. Tr. Vol. II at 325-27;332.

Petitioner contends that Ms. Thomas' testimony would have shown that S.O. was fabricating the allegations against Petitioner and that she had a motive for lying about the mo-

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[10]S.O. testified that after Petitioner's sexual touching on April 19, 1999, she told two of her friends and later wrote a note that was given to S.O.'s school counselor by one friend's grandmother. Tr. Vol. II at 262-67. She testified that the school counselor discussed the matter with her and encouraged her to tell her mother about the situation. *Id.* at 267.

lestation. However, as discussed below, Petitioner fails to establish a reasonable probability that Ms. Thomas' testimony would have resulted in a different outcome at trial because (1) Petitioner made incriminating admissions to Department of Human Services (DHS) and law enforcement authorities concerning the 1997 and 1999 acts of lewd molestation against S.O.; (2) Petitioner wrote a letter of apology to S.O. essentially stating he was sorry for what he had done and he was sorry that he had claimed S.O. was lying; and (3) defense counsel had an opportunity to explore Petitioner's relationship with S.O.

The record shows that following a phone contact by Guy Huggins, Grady County DHS supervisor, Petitioner voluntarily came to the DHS office on May 7, 1999, and met with Huggins and Grady County Deputy Sheriff Laura Miller. Tr. Vol. II at 423; Tr. Vol. III at 462-63. Deputy Miller testified that during the interview Petitioner denied the allegations of improper conduct but admitted that in 1997 he had rolled over against S.O., and put his arms around her and that he had rubbed his penis against her back. Tr. Vol. II at 424-25. Petitioner stated that during those acts, he thought that S.O. was his wife. Tr. Vol. II at 425. As to the April 19, 1999, allegations, Petitioner agreed that S.O. had been home ill, but denied having improperly touched her at that time. Tr. Vol. II at 426.

Petitioner was interviewed again on the morning of June 7, 1999, by Oklahoma State Bureau of Investigation (OSBI) Agent David Real, while Deputy Miller observed the interview by closed circuit television. Tr. Vol. at 427; Tr. Vol. III at 465; Tr. Vol. III at 491. Agent Real questioned Petitioner about the allegations made against him,[11] and Petitioner admitted to two separate incidents of rolling over in bed and touching S.O. improperly and rubbing his penis against her. Tr. Vol. III at 496; Tr. Vol. II at 428. He also admitted that on April 19, 1999,

[11]Petitioner was advised of his *Miranda* rights and signed a waiver before Agent Real began the interview. Tr. Vol. III at 491.

when S.O. was home ill, he climbed into bed with her and rubbed lotion on her buttocks and rubbed his penis on her vagina. Tr. Vol. III at 497. Petitioner admitted that he felt bad about his actions and that he had a problem. Tr. Vol. III at 498.

On the afternoon of June 7, Petitioner on his own accord went to the office of DHS Supervisor Huggins and asked to speak to him. Huggins and Deputy Miller again interviewed Petitioner. Tr. Vol. II at 429. Deputy Miller testified that after Petitioner received a *Miranda* warning and signed a rights waiver, during the subsequent taped interview Petitioner admitted that he had inappropriately touched S.O. and had rubbed his penis against her buttons and her back. Tr. Vol. II at 433.[12] Huggins testified that Petitioner admitted applying lotion/butter to S.O., rubbing his erect penis on her buttocks, and taking S.O. into the shower and cleaning her afterward. Tr. Vol. III at 466; *see also* Tr. Vol. II at 433. Huggins testified that he asked Petitioner to write a letter of apology to be given to S.O.'s therapist, and Petitioner did so, stating that he was sorry for what he had done and that he was sorry that he had said S.O. was lying. Tr. Vol. III at 470-72 *see also* Response, Ex. E (State's Exhibit 4).

[10]In his reply Petitioner objects to the Respondent's reference to and reliance on the transcript of the June 7, 1999, taped "confession." *See* Response at 9-10 and Response, Ex. D (State's Exhibit 3A). Petitioner argues that the transcript contains numerous deficiencies and that 'all of the inaudible' remarks were Deputy Miller's or Mr. Guy Huggins.'" Petitioner's Reply at 4. Petitioner correctly points out that the transcript was not admitted into evidence at trial. The record shows that the trial court admitted the tape recording but not the transcript. *See* Tr. Vol. III at 488. The undersigned has not considered the transcript of the taped interview and has only considered the trial testimony of DHS Supervisor Huggins and Deputy Miller, and thus, Petitioner's objections have no effect on the analysis set forth above.

In his testimony at trial Petitioner did not deny that he committed the acts which S.O. alleged were committed in 1997; he claimed that the inappropriate touching in that instance was an accident and that he had mistakenly thought that his daughter was actually his wife. Tr. Vol. III at 530. With respect to the statements he made to authorities concerning the April 19, 1999, incident, Petitioner admitted that he had answered yes to the questions asked during the interviews but indicated that he had been confused by the questions and was trying to explain what had happened. Tr. Vol. III at 523-24. Petitioner testified that any instance of inappropriately touching S.O. had been an accident, and that he was sorry for "the accidents that happened in [his] bed." Tr. Vol. III at 530; *see also* Tr. Vol. III at 535. He also attempted to explain that he did the inappropriate touching in his sleep or as he was waking up in the morning, and that the "problem" he had referred to during the interviews was the fact that he "enjoy[ed] having sex in the morning." Tr. Vol. III at 542.

Finally, during cross-examination of S.O. and her mother, and during direct examination of Petitioner, Petitioner's counsel explored the relationship between Petitioner and S.O. and the possibility that S.O.'s allegations of abuse were made in response to and in retaliation for his disciplinary measures. Both S.O. and her mother testified that S.O. and Petitioner had "normal" or "regular" arguments that would be typical between a parent and child. Tr. Vol. II at 295; Tr. Vol. II at 354.[13]. When

[13]During defense counsel's cross-examination of Mrs. Hawkins, she testified that S.O. disclosed Petitioner's improper touching in 1997, after Petitioner had scolded S.O. Tr. Vol. II at 351; *see also* Tr. Vol. III at 509 (Petitioner testified that S.O. told her mother after he had grounded her for not doing her homework and told her to do the dishes). Mrs. Hawkins further testified that in the spring of 1999, her daughter always wanted to be near her and seemed angry about something. *Id.*at 353.

questioned about his relationship with S.O., Petitioner testified that S.O.'s attitude toward him was "off and on," and usually depended on her mother's attitude. Tr. Vol. III at 518.

On this record, including the alleged testimony that Ms. Thomas would have given if counsel had timely disclosed her identity and the substance of her testimony, the undersigned finds that Petitioner fails to establish a reasonable probability that Ms. Thomas' testimony would have resulted in a different outcome at trial. Accordingly, Petitioner fails to show that his counsel's failure resulted in prejudice to him. *Strickland,* 466 U.S. at 694. Likewise, he fails to show how a request for another continuance would have changed the outcome of his trial. Because the OCCA neither adjudicated Petitioner's claim of ineffective assistance of counsel in a manner that was "contrary to, or ... an unreasonable application of, clearly established Federal law' nor made its decision "based on an unreasonable determination of the facts," the undersigned finds that Petitioner is not entitled to habeas relief on his claim of ineffective assistance of counsel.[14] *See* 28 U.S. C. § 2254 (d).

III. Petitioner's Request for Evidentiary Hearing

Petitioner requests an evidentiary hearing on his claim of

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[14]In his petition and in his reply brief, Petitioner refers in conclusory fashion to a number of other alleged failures of his trial counsel that allegedly prejudiced him at trial. These alleged inadequacies may be summarized as follows: Failure to object to the admission of an "inaudible" tape and allowing the jury to read an incorrect transcript of the taped interview, failing to request another continuance in order to allow a crucial witness to testify, abandoning his duty of loyalty to Petitioner and general deficiencies in preparing for Petitioner's trial. Petitioner's Replay at 11-13. These claims, raised for the first time in a reply brief, have not been properly raised and therefore have not been considered. *See Burdick v. Klinger,*

ineffective assistance of trial counsel "so that all the ramifications of his counsel's representation can be fully and completely explored." Petition at 16. Title 28 U.S.C. § 2254(e)(2) narrowly prescribes the circumstances pursuant to which a habeas petitioner may obtain an evidentiary hearing; however, this provision applies only where a habeas petitioner has failed to develop the factual basis of a claim in state court. *See. e.g., Cannon v. Mullin,* 383 F. 3d 1152, 1175 (10th Cir. 2004); *Le v. Mullin,* 311 F.3d 1002, 1012 (10th Cir. 2002), *cert. denied,* 540 U.S. 833 (2003). Petitioner raised his ineffective assistance of counsel claim on direct appeal, moved to supplement the record with an affidavit by Bianca Thomas regarding her pretrial contact with defense counsel and her allegations of S.O.'s possible improper motivation, and requested an evidentiary hearing which was denied by the OCCA. *See* Relevant State Court Records, Ex. A at 15 and Ex. 3 at 2. *See Williams v. Taylor,* 529 U.S. 420, 436-437 (2000) (a habeas petitioner fails to develop the factual basis of his claim only if he is not diligent; diligence requires that the prisoner, at a minimum, "seek an evidentiary hearing in state court in the manner prescribed by state law."). In considering Petitioner's motion for evidentiary hearing, the undersigned finds that Petitioner "was dili-

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No. 98-6425, 1999 WL 495634, at *1 (10th Cir. July 14, 1999) (declining to consider state habeas petitioner's equal protection claim, which was raised for the first time in his reply to the state's response in the district court); *see also United States v. Murray,* 82 F.3d 361, 363 n. 3 (10th Cir. 1996); *United States v. Hardwell,* 80 F.3d 1471, 1495 (10th Cir. 1996). Moreover, the factual bases of these ineffective assistance of counsel claims were not raised on direct appeal and therefore remain unexhausted; thus, if such claims had been properly raised before this Court, the result would be a mixed petition, subject to dismissal for failure to exhaust. *See Rose v. Lundy, 455 U.S. 509, 510 (1982).*

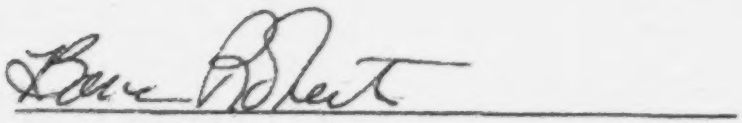
gent in trying to develop the facts underlying his [ineffective assistance] claim," *Cannon*, 383 F.3d at 1176, and therefore the standard in § 2254(e)(2) is not controlling. Rather, Petitioner is entitled to an evidentiary hearing if "his allegations, if true and not contravened by the existing factual record, would entitle him to habeas relief." *Id.* (quoting *Bryan v. Mullin*, 335 F.3d 1207, 1214 (10th Cir. 2003)). As set forth in detail in this Report and Recommendation, Petitioner's claim of ineffective assistance of counsel is contravened by the record. Therefore, the undersigned recommends that Petitioner's request for an evidentiary hearing be denied.[15]

[15]Of course, if § 2254(e)(2) were to apply, Petitioner's request for an evidentiary hearing would fail as well. His claims do not rely on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" (28 U.S.C. § 2254(e)(2)(A)(i)) or "a factual predicate that could not have been discovered through the exercise of due diligence" (28 U.S.C. §2254(3)(2)(A)(ii)). Moreover, Petitioner cannot show that the facts underlying the claim "would be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found [him] guilty of [two counts of lewd molestation]. 28 U.S.C. § 2254(e)(2)(B).

RECOMMENDATION

For these reasons, it is the recommendation of the undersigned Magistrate Judge that the petition for writ of habeas corpus be denied. Petitioner is advised of his rights to file an objection to this Report and Recommendation with the Clerk of this Court by December 1, 2004, in accordance with 28 U.S.C. § 636 and Local Civil Rule 72.1. Petitioner is further advised that failure to make timely objection to this Report and Recommendation waives his right to appellate review of both factual and legal issues contained herein. *Moore v. United States,* 950 F. 2d656 (10th Cir. 1991). This Report and Recommendation disposes of the issues referred to the undersigned Magistrate Judge in the captioned matter.

ENTERED this 12th of November, 2004.



BANA ROBERTS
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

GAVIN LEE HAWKINS,	)	
Appellant,	)	
	)	**NOT FOR PUBLICATION**
v.	)	
	)	**CASE NO. F-2001-264**
STATE OF OKLAHOMA,	)	
Appellee.	)	

SUMMARY OPINION

LILE, JUDGE:

Gavin Lee Hawkins was convicted at jury trial of Count I, Lewd Molestation and Count III, Lewd Molestation in violation of 21 O.S. 1991, § 1123(A) in the District Court of Grady County in Case Number CF-1999-186. The Honorable Richard G. Van Dyck, District Judge, followed the jury verdict and sentenced Appellant to ten (10) years and twenty (20) years imprisonment, respectively, and ordered the sentences to be served consecutively. Appellant has perfected this Appeal.

Appellant raises the following propositions of error in support of his appeal:

1. THE PROSECUTOR COMMITTED REVERSIBLE MISCONDUCT IN HER CLOSING ARGUMENT.
2. BY FAILING TO FULLY CONSIDER ALL AVAILABLE SENTENCING OPTIONS, THE DISTRICT COURT VIOLATED MR. HAWKINS' DUE PROCESS RIGHTS.
3. THE TRIAL COURT ERRED WHEN IT PROHIBITED

MR. HAWKINS FROM CALLING BIANCA THOMAS AS A WITNESS.

4. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

After a thorough consideration of these propositions and the entire record before us on appeal, including the original record, available transcripts and briefs of the parties, we have determined that modification is required under the facts and the law.

Concerning Proposition I, the sentence on Count III should be modified to ten (10) years by reason of an improper prosecutorial closing argument. *Smallwood v. State,* 1995 OK CR 60, 907 P.2d 217; *McCarty v. State,* 1988 OK CR 271, 765 P.2d 1215.

As for Proposition II, there is no evidence that the trial court did not properly fulfill its sentencing duties.

In Proposition III, the trial court did not abuse its discretion by excluding the testimony of Bianca Thomas. *State v. LeSebura,* 1994 OK CR 38, 875 P.2d 431.

Lastly, in Proposition IV, trial counsel performed below an objective standard of reasonableness, but Appellant suffered no prejudice. *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Appellant's Application to Supplement the Record and Application for Evidentiary Hearing are denied.

DECISION

The Judgment of the trial court is **AFFIRMED** as to both counts and the Sentence on Count I is **AFFIRMED**. The Sentence is **MODIFIED** on Count II to ten (10) years imprisonment, with the sentences to run consecutive as ordered by the district court.

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OPINION BY: LILE, J.

LUMPKIN, P.J.; CONCURS IN RESULTS
JOHNSON, V.P.J.; CONCURS
CHAPEL, J.; CONCURS
STRUBHAR, J.; CONCUR

APPENDIX E

IN THE DISTRICT COURT OF GRADY COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,	)	
Plaintiff,	)	**NO. CRF-99-186**
v.	)	
GAVIN LEE HAWKINS,	)	
Defendent.		

DEFENDANT'S AMENDED WITNESS AND EXHIBIT LIST

COMES NOW the Defendant, by and through, Scott R. Tack, and amends his witness and exhibit list to add the following:

Witnesses

8. Binky Thomas. Address will be provided. Should testify she heard Stephanie Owens talking to her brother about how to "get rid" of the Defendant. She also may testify that Stephanie Owens made false aggregations about abuse to the DHS.

Exhibits

2. School attendance records for Michael Owens on 4-19-99.

ALLEN, ALLEN & TACK

By_____
SCOTT R. TACK, OBA #8818
210 Chickasha Ave., P.O. Box 1409
Chickasha, Oklahoma 73023
(405) 224-3111
Attorney for Defendant

CERTIFICATE OF DELIVERY

This is to certify that on the 31 day of January, 2001, a true and correct copy of the above and foregoing instrument was hand delivered to the office of the District Attorney for Grady County, Oklahoma.

_____
SCOTT R. TACK

Scott Tack says:

The Ledford case, yes, took -- for some reason took precedence over this case. But I mean I tried that case. I couldn't help it. I couldn't try both of those cases at one time. The second time it was continued was because I had a personal problem, as the Court is aware.

However, I think it's the spirit of that rule we're involved with here. Character witnesses that obviously - you know, I just don't see how that's prejudicial.

Your honor, you know, six days notice instead of ten days - I made these people available. I just don't understand

how that's prejudicial. My client would be severely prejudiced as far as no, you're not having any witnesses because you did it six days instead of ten days, when I talked to the D.A.'s office about it. That's why I was doing it, was to see if they were going to object.

THE COURT: Well I agree with you that it's ten days prior to trial, whether the trial be in September, December or January. But you're not ten days prior. Are you telling me you're totally unaware of any of these witnesses prior to this date?

MS. MARCH; No. Prior to him bringing it to me?

THE COURT: Right.

MS. MARCH: No. In fact, I'm shocked today when I find out that Binky is Bianca Owens. That's a whole new can

DISTRICT COURT OF OKLAHOMA - OFFICIAL TRANSCRIPT

EXHIBIT "B"

STATE OF OKLAHOMA)
) ss.
COUNTY OF GRADY)

AFFIDAVIT OF BIANCA THOMAS

I, Bianca Thomas, do hereby upon my oath depose and state that:

1. I was married to John Owens. During our marriage, his daughter, Stephanie Owens and sons Jason Owens and Jay Michael Owens often spent time at my home.

2. On a Saturday morning in September, 1998, I observed the three children writing on a tablet. At the top of the page the words "How to Get Rid of Gavin" appeared. I had to tell the

children twice to quit writing. During this period of time, the children suggested "poisoning Gavin" or "killing him." They stated that they "hated him."

3. Gavin made the children "mind". They were not used to any real discipline. Neither their father nor mother made much of an effort at making the children obey basic rules.

4. In 1999, I had a discussion with Stephanie. During that discussion, she stated that she "would do anything to get rid of Gavin." She said that "she and her brothers wanted their Mom back." Stephanie also told me that her brother, Jason, snuck into her room and had "touched her." Stephanie stated she didn't know "if she was a virgin."

5. About three weeks after my conversations with Stephanie, I learned that she had alleged that Gavin had sexually molested her. Despite the fact that she had told me that Jason had molested her, she never claimed that Gavin had ever touched her inappropriately.

6. I spoke to Gavin's attorney, Scott Tack. I told him of my conversations with Stephanie. Mr. Tack seemed very enthused about my testimony. Despite this enthusiasm, I was not called upon to testify.

FURTHER, AFFIANT SAYETH NOT.

_____

BIANCA THOMAS

Subscribed and Sworn to before me this 1st day of November, 2001

_____

NOTARY PUBLIC

My commission Expires 6/10/2004

J. CONCLUSION

For the reasons stated, Mr. Hawkins' conviction and sentence are fatally flawed. Mr. Hawkins therefore asks this Court to take up his claims on their respective merits, order necessary evidentiary hearings, and in due course set aside his conviction and sentence and remand his case to the Tenth Circuit Court of Appeals and/or the State District Court of Grady County for dismissal, or a new trial consistent with this Court's holding, or for such other and further relief as the Court may deem proper and in the interests of justice.

Wherefore, the reasons stated, the Petition for a Write of Certiorari should be granted.

Respectfully submitted

Gavin Lee Hawkins 394132

Gavin Lee Hawkins #394132
James Crabtree Correction Center
Route 1, Box-8
Helena, Oklahoma 73741-9606

Date: July 19, 2006